(2)

Supreme Court, U.S.
FILED
OCT 17 2003
OFFICE OF THE CLERK

No. 03-404

In the
# Supreme Court of the United States
October Term 2003

JEROME JARRETT,

Petitioner,

*v.*

TOWN OF YARMOUTH, ROBERT CHAPMAN, AND PETER McCLELLAND,

Respondents.

**Petition for a Writ of Certiorari To The United States Court Of Appeals For The First Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

Leonard H. Kesten*
Deidre Brennan Regan
Brody, Hardoon, Perkins & Kesten, LLP
One Exeter Plaza
Boston, Massachusetts 02116
(617) 880-7100
*Counsel for Respondents*

**Counsel of Record*

Blanchard Press, Inc., Boston, Mass. — Law Printers (617) 426-6690

24 pp

## QUESTIONS PRESENTED

1. Whether the First Circuit Court of Appeals correctly determined that the jury's indictment of the Town's bite-and-hold policy as being unconstitutional was without legal basis where there was no record support finding bite-and-hold policies unconstitutional on their face?

2. Whether the First Circuit Court of Appeals properly determined that there was no record support for finding a bite-and-hold policy unconstitutional on its face and examined instead whether the particular use of the bite-and-hold at issue was excessive and in violation of the Fourth Amendment?

3. Whether, after considering the jury's resolution of disputed factual issues and the balancing test of *Graham v. Connor*, 490 U.S. 386 (1989), the First Circuit correctly determined that the police officer's release of a police dog trained to bite-and-hold did not violate the petitioner's Fourth Amendment rights under the circumstances?

4. Whether the First Circuit properly confined its constitutional inquiry to whether the police officer exercised unreasonable non-deadly force in releasing the dog where the plaintiff produced no authority indicating that the use of trained police dogs was considered deadly force and where counsel conceded to the Court that the deadly force issue was irrelevant to the appeal?

## LIST OF PARTIES

The petitioner states that there is no record disposition of the claims against Defendants Gerard Britt, Cheryl Nugent Gomsey, and Richard White. By way of clarification, the First Circuit Court of Appeals noted that the petitioner did not contest that his claims against these defendants were abandoned and that any failure to enter judgment for these officers did not undermine its appellate jurisdiction. *Jarrett v. Town of Yarmouth*, 331 F.3d 140, 144 (1st Cir. 2003), at Petition Appendix (" Pet. Apx.") A.

## TABLE OF CONTENTS

PAGE

Questions Presented ..... i

List of Parties ..... ii

Table of Contents ..... iii

Table of Authorities ..... iv

Statement of the Case ..... 1

Reasons for Denying the Writ ..... 10

Argument ..... 10

Conclusion ..... 18

## TABLE OF AUTHORITIES

PAGE

CASES

*Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994) .....12

*Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989) .....11, 15-16

*Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999) .....16

*Kuha v. City of Minnetonka*, 328 F.3d 427 (8th Cir. 2003).....15

*Marley v. City of Allentown*, 774 F.Supp. 343 (E.D. Pa. 1991), *aff'd mem.* 961 F.2d 1567 (3d Cir. 1992) .....12

*Monell v. New York Dep't. of Soc. Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978) .....7, 8

*Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S.Ct. 614 (1955) ..... 10

*Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988) .....13

*Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985) .....13, 15

PAGE

*Vera Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1997) ..... 13

*Watkins v. City of Oakland*, 145 F.3d 1087 (9th Cir. 1998) ..... 12

*Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692 (1999) ..... 18

**FEDERAL CONSTITUTIONAL PROVISIONS**

U.S. Const., amend. IV ..... *passim*

**STATUTES, RULES AND REGULATIONS**

42 U.S.C. § 1983 ..... 7

Supreme Court Rule 10 ..... 10

## STATEMENT OF THE CASE

### I. Factual Background.

In the dark early morning hours of December 16, 1994, Officer Britt, a patrolman with the Town of Yarmouth ("Town"), observed an operator of a motor vehicle in a motel parking lot watch him as he proceeded past his car and then take off in the other direction at a high rate of speed. Officer Britt turned around and radioed Officer White, who was passing by, advising him of the situation.

Officer Britt saw the car head into another parking lot. Officer White made a dispateh over the radio that he recognized the car's operator as Jerome Jarrett, the petitioner, and that he was a suspect that had been involved in an armed robbery. Officer White activated his blue lights and headed into the parking lot. Officer Britt came into the lot from a different direction. The car proceeded through the lot, toward an exit onto another road. It approached Officer Britt's vehicle, and Officer Britt activated his blue lights, but the car did not stop. Officer Britt made a u-turn to the right to avoid the car, and he hit the curbing. Jarrett's car proceeded into another parking lot, where it struck a cement post. He then existed the vehicle, scaled a nearby fence, and fled into a residential neighborhood.

Two more police officers arrived. Officer Gomsey who had clocked the petitioner speeding and had observed him jump the fence and Officer McClelland, a patrolman with the department for some twenty years. He has been the K9 handler for the depart-

ment since 1981. His K9 partner was a dog named Shadow.

Officers Gomsey and White identified the person they were chasing as Jerome Jarrett. Officer White suspected that he had been involved in a prior armed robbery. Officer McClelland knew the name because of his involvement in an earlier track following an armed robbery at a gas station.[1] Officer McClelland started the track, teamed with Officer Gomsey who stayed some distance behind so as not to contaminate the scent. They went over a fence, and continued the track. Shadow was on a leash, with a 15 foot lead. Officer McClelland heard over his radio that the suspect's vehicle was unregistered and uninsured, and that its operator had a suspended license.

The neighborhood was one of many crossing streets, with a number of cottages and homes. It was a maze of houses and bushes and trees. After following Shadow on a circuitous route through the neighborhood Officer McClelland saw a flash or blur of something he thought was someone running in the darkness at the corner of a house. He ran to that location and saw the plaintiff in the middle of the road about fifty yards ahead, running. Officer McClelland gave three verbal warnings, which Officer Gomsey heard, to "stop, police or I'll send the dog." Jarrett looked back at him and accelerated his speed up the street. Only then did Officer McClelland release Shadow's leash. Some thirty sec-

---

[1] Although he ended that earlier track without finding the suspect, Officer McClelland later found out Jarrett had been arrested and charged for it. RT 641-643.

onds later, Officer McClelland came around to the front of the house and saw Jarrett standing in the yard, and Shadow had a hold of him behind the knee. The track had lasted about eighteen minutes.

After determining Jarrett had no weapons, Officer McClelland called Shadow off. Shadow came back to his side. Jarrett got to the ground with his hands out on Officer McClelland's command. An ambulance arrived within five minutes and transported Jarrett to a hospital where he received stitches for cuts on his lower right leg.

Jarrett was issued citations for speeding, failing to yield, failing to stop for a police officer, leaving the scene of property damage, operating after suspension, operating unregistered, uninsured vehicle, and defective equipment.

Jarrett recounted a different version of events. He testified that, on December 16th, he left work in Hyannis at approximately 11:30 p.m. to pick up a car he had purchased in South Yarmouth. He did not remember the names of the car seller, how much he paid for it, nor the location where he picked it up from. The car was neither registered nor insured, and his license had been suspended. Jarrett admitted he put improper license plates on it that night.

Jarrett testified that he started having problems with his brakes on Route 28, and was trying to slow down. He testified that he did not see any police cruisers while on Route 28 until he had gone past one or two stop lights, and had turned into a parking lot to try to slow the car down. He glided into the lot and then proceeded into another lot. He testified

that he then noticed the police lights, just seconds before he hit the pole.

Jarrett admitted he ran from police, that he did so because he was driving illegally, and that if he got arrested, he was going to end up in jail. He was on probation and there had been a surrender hearing which he had not appeared for, and a warrant had issued.

According to Jarrett, he got up after jumping the fence and was starting to run when he heard someone yell "Stop." He fell and got up a second time and heard a voice say "stop or I'll let the dog go." Jarrett claims that he stopped running and put his hands in the air. He says that the dog was then ordered to bite him by someone he couldn't see. He said that the dog bit him on the leg, let go, and was ordered to bite him again. It was his position then that the dog had been sicced upon him after his surrender.

By the time of his closing in the first phase of the trial, against Officer McClelland, however, the plaintiff had abandoned his original version of facts regarding his surrendering, stating that it wasn't an issue in the case, and that his case "doesn't fall on whether or not you believe Jerome Jarrett stopped or didn't stop." RT 871. The theme of the closing was that the use of a trained bite-and-hold police dog was an instrument of force likely to cause serious injury or death, to be used only when the suspect presents an immediate and credible threat of serious bodily injury or death. RT 856-862, 875-876.

Jarrett asserts that the First Circuit's decision was "incorrect and misleading" in certain respects,

but none of those assertions bear out. For example, he says that the Court did not discuss or acknowledge that "by attacking and biting Mr. Jarrett the dog attack violated generally accepted law enforcement standards governing the use of physical force against suspects." Petition, p. 4. The Court, however, did address this argument, noting that the "undisputed evidence at trial indicated that the vast majority of jurisdictions within the United States employ bite-and-hold policies." It also noted that Jarrett:

> "pointed to no contrary authority indicating that the use of trained police dogs is considered deadly force under certain circumstances. In fact, he concedes that '[b]ecause none of plaintiff's witnesses testified that a police dog like McClelland's was deadly force, nor did plaintiff's counsel argue it to the jury, and because the trial court rejected the plaintiff's deadly force instruction, the deadly force issue [was] irrelevant to this appeal.' "

Pet. Apx. A-15, 16.[2]

Indeed, Richard Rogers, a former police dog handler and current police dog teacher, testified at trial that

---

[2] The plaintiff also complains that the Court "omits mentioning that Yarmouth officers were also trained that '[f]orce likely to cause death or serious bodily injury' was deadly." Petition, p. 4. But, that definition was in terms of the Town's written policy which limited to firearms. Chief Chapman expressly testified that the use of a trained police dog did not fit into the written definition of deadly force which he gave to police officers. RT 996-997.

it was appropriate to begin a track in the circumstances described here, as well as to release Shadow. RT 589-591. Police dogs are taught the bite-and-hold technique. RT 586. The dog is taught that when he is told a command, he is to grab the suspect and restrain, and not release until commanded to do so. RT 586-587. This technique was prevalent in 1994, and is still. RT 587-588, 824.

The plaintiff's own expert, Vanness H. Bogardus III, confirmed that bite-and-hold is a standard and "[e]verybody that trains a police dog trains according to the same standard. We train according to it. Anyone who is training even a new dog today would be training according to that standard." RT 717-718. The other method — where the dog is expected to indicate to the handler the location of the person, not necessarily to attack — is the police dog standard of Germany. RT 706-707. This standard is different than the United States Police Canine Association ("USPCA"). RT 708. Mr. Bogardus also acknowledged that Shadow not only had performed satisfactorily in the USPCA activities, but that he had titles under European standards as well. RT 717. At all times pertinent, the bite-and-hold method was one accepted by the USPCA. RT 776-777.

Jarrett also complains that the First Circuit did not mention Chief Chapman's testimony regarding his oversight of dog handlers, which Jarrett characterizes as the Chief's knowledge that "when officers ... are not held accountable, constitutional violations occur." Petition, p. 6. The Court, however, had determined that Officer McClelland had committed no such constitutional violation in his release of

Shadow in the circumstances. Pet. Apx. A-19, 20.

## II. Procedural Background.

In December, 1997, plaintiff Jerome Jarrett filed 42 U.S.C. § 1983 claims against the defendants Officer Peter McClelland and Police Chief Robert Chapman, alleging the use of excessive force in releasing Shadow and that the Chief "tolerated a pattern and practice of unjustified, unreasonable and excessive force regarding McClelland's use of a dog to attack and bite." [3] He also brought suit against the Town of Yarmouth, seeking to hold the municipality liable under the theory of *Monell v. New York Dep't. of Soc. Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978).

The case proceeded to a jury trial, which the court divided into two phases. In the first phase, the jurors considered Jarrett's excessive force claim against Officer McClelland. They ultimately returned a verdict for Jarrett, finding that Officer McClelland had used excessive force but awarding damages of only $1.00. Although the Town was not mentioned in either the jury instructions or the verdict form for this phase, the jury, unprompted, appended to their verdict a recommendation that "the Town of Yarmouth be required from this time forward to ... retrain current K-9 units to use the find and bark method."

Following the verdict, Officer McClelland and Chief Chapman moved for judgment as a matter of

[3] Jarrett also brought claims against Yarmouth police officers Gerard Britt, Cheryl Nugent, and Richard White, but did not pursue these claims at trial. Pet. Apx. A-2.

law, renewing their argument that they were entitled to qualified immunity. The court denied their motion, and the trial moved into its second phase, where the jury considered Jarrett's claim for punitive damages against Chief Chapman. After hearing the evidence, the jury completed the verdict form for this phase. In response to the first question — "Did defendants Peter McClelland act in accordance with Town of Yarmouth (sic) policy and procedure when he released the dog on December 16, 1994?" — the jury answered "Yes." The findings from the two phases, along with the jury's recommendation that the Town retrain its canine units under a different method, indicate that the jury found the Town's bite-and-hold policy to be unconstitutional. [4] Pet. Apx. A-17, 19.

The jury said it awarded punitive damages, but it did not state an amount. Instead, it stated the defendant was to pay for all reasonable legal fees and expenses incurred by the plaintiff's attorney. The court asked plaintiff's counsel the amount of her fees, indicating that he was going to ask the jury to place a number on it, which defendant argued was improper. The court then instructed the jury that they had to provide a dollar amount. The jury returned with the dollar amount of $50,000.

---

[4] The jury was not explicitly invited to issue a verdict with respect to the Town in either phase of the trial. Neither the jury instructions nor the verdict forms expressly referenced the Town as a party. The First Circuit Court of Appeals concluded that Jarrett had nonetheless preserved his *Monell* claim against the Town and that by entering judgment on both verdicts, the district court terminated litigation on the merits with respect to McClelland, Chapman (both of whom were sued in their individual and official capacities) and the Town. Pet. Apx. A-3, 9-10.

Judgment entered thereafter, it being ordered and adjudged that judgment enter for the plaintiff in the amount of $1.00 for Phase I (defendant McClelland) and in the amount of $50,000 for Phase II (defendant Chapman).

The defendants moved for judgment as a matter of law, or for a new trial, arguing that plaintiff had failed to produce sufficient evidence to support the findings in his favor on any claims, and that the two officers were entitled to qualified immunity. The court denied the post-trial motion and the defendants appealed.

The First Circuit Court of Appeals in a decision dated October 25, 2002, reversed the judgments on grounds of qualified immunity. Pet. Apx. B-2. After careful review, that Court attributed the following factual findings to the jury: 1) Officer McClelland issued three verbal warnings to Jarrett before releasing Shadow, and 2) at the time McClelland released Shadow, Jarrett had not surrendered to the police, but was resisting arrest by fleeing.

Jarrett petitioned for rehearing, arguing *inter alia* that the Court lacked jurisdiction because the judgment only disposed of claims against Officer McClelland and Chief Chapman and not the other defendants, that the Town was not entitled to qualified immunity, and that the Court misconstrued his claim against the Chief inasmuch as he wasn't arguing a deadly force issue.

In March 2003, the First Circuit granted the request for rehearing, denied the request for rehearing en banc, and withdrew its opinion. In May, 2003,

the First Circuit issued a decision, attributing the same factual findings to the jury and ruling that it had jurisdiction over the appeal and that Jarrett had suffered no constitutional injury. Accordingly, it vacated the judgments against the defendants.

In June, 2003, the First Circuit denied the plaintiff's petition for rehearing and the suggestion for the holding of a rehearing en banc. Pet. Apx. C-1.

## REASONS FOR DENYING THE WRIT

According to Supreme Court Rule 10, a petition for writ of certiorari will be granted only when there exists "special and important" reasons therefor as, for example, when a United States Court of Appeals has rendered a decision in conflict with that of another United States Court of Appeals on the same matter or has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision."

Also, as indicated by the requirements of Rule 10, certiorari is granted only in cases involving principles the settlement of which is important to the public as opposed to the parties. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S.Ct. 614 (1955).

The petition here presents no issue meriting exercise of this Court's certiorari jurisdiction. Much of the petition rests on a mischaracterization of the First Circuit's decision. For example, contrary to the petitioner's assertion, there is no conflict among the

circuits as to whether a police officer who uses a trained police dog escapes Fourth Amendment scrutiny on a claim of excessive force. The First Circuit applied such scrutiny in the case before it.

Likewise, the petitioner has not identified any "special and important" reasons warranting this Court's review. Rather, what he is complaining of simply is that the First Circuit failed to find in his favor.

**1. There is No Conflict Among the Circuits.**

The petitioner states that the First Circuit has determined that a police dog attack pursuant to a municipal policy of "bite-and-hold cannot constitute excessive force..." and that police officers who "let a dog inflict the injury pursuant to" such policy thus escape Fourth Amendment scrutiny in the First Circuit. Petition, p. 11. This assertion mischaracterizes the Court's holding. In fact, the First Circuit had stated that it was aware of no decisions "suggesting that bite-and-hold policies are unconstitutional per se" and that "there is no record support for finding bite-and-hold policies unconstitutional on their face ...." Pet. Apx. A-17, 18. It further stated that such determination nonetheless "still leaves open the question of whether the particular use of bite-and-hold force at issue here was excessive under the circumstances." Pet. Apx. A-18. It then did, contrary to petitioner's assertion otherwise, scrutinize Jarrett's claim under the *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865 (1989), standard and properly conclude that Officer McClelland's release of the dog did not violate Jarrett's Fourth Amendment rights. The "nation" thus does know

that Fourth Amendment rules do apply to officers who use police dogs. Petition, p. 12.

Given it is based on a mischaracterization of the First Circuit's ruling, Jarrett's claim of a conflict in the circuits falls flat. Jarrett asserts that the decision "contradicts that reached by the Ninth Circuit in *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994)," but the First Circuit actually relied upon *Chew* as support and stated in part:

> "[w]e are aware of no post-*Chew* decisions suggesting that bite-and-hold policies are unconstitutional per se. Indeed, four years after *Chew*, the Ninth Circuit reiterated in *Watkins v. City of Oakland*, 145 F.3d 1087 (9th Cir. 1998) that since *Chew* 'there had been no change in the law that would have alerted [the defendant] that his use of a police dog to search and bite was unconstitutional.' "

Pet. Apx. A-17.

Jarrett also cites to the federal district court case of *Marley v. City of Allentown*, 774 F.Supp. 343, 346 (E.D.Pa. 1991) *aff'd mem.*, 961 F.2d 1567 (3d Cir. 1992) as being in conflict with the First Circuit's decision. In *Marley*, the court denied the defendant's motion for judgment as a matter of law because the release of a police dog to attack an unarmed suspect who "possibly" had stopped fleeing "may be objectively unreasonable." The First Circuit, however, agreed that excessive force has been used if a police officer sics a dog on a person who is surrendered and under control. Pet. Apx. A-12. There is no conflict on this point.

Petitioner's claim of a conflict among the circuits is erroneous and thus does not provide a basis warranting the grant of the petition.

## II. Review is Not Necessary to Determine Whether *Tennessee v. Garner* is Limited to Firearms.

No federal appeals court has held that a properly trained police dog is an instrument of deadly force and several have expressly concluded otherwise. The First Circuit noted this point in its decision:

> "In the leading case of *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988), the police released a dog into a building to apprehend a burglary suspect. The dog fatally wounded the suspect by biting him in the neck, and the administratrix of the decedent's estate filed a § 1983 action alleging that the police had used 'unnecessary deadly force.' Notwithstanding the fact that the decedent was killed by the police dog, the Sixth Circuit determined that 'the use of a properly trained police dog to apprehend a felony suspect does not carry with it a substantial risk of causing death or serious bodily harm.' *Id.* at 912 (internal quotation marks and footnote omitted). The Ninth Circuit similarly concluded that the use of police dogs trained in the 'bite-and-hold' technique generally does not constitute deadly force, absent some demonstration by the plaintiff 'that properly trained police dogs are reasonably capable of causing death.' *Vera Cruz v. City of Escondido*, 139 F.3d 659, 663 (9th Cir. 1997). Jarrett points us to no contrary authority indicating that the use of trained police dogs is

> considered deadly force under certain circumstances. *In fact, he concedes that '[b]ecause none of plaintiff's witnesses testified that a police dog like McClelland's was deadly force, nor did plaintiff's counsel argue it to the jury, and because the trial court rejected plaintiff's deadly force instruction, the deadly force issue is irrelevant to this appeal.'*
>
> "Consequently, our constitutional inquiry is confined to the question of whether Officer McClelland exercised unreasonable non-deadly force in releasing Shadow to apprehend Jarrett."

Pet. Apx. A-15, 16 (emphasis added).

Despite having represented to the First Circuit that the issue was irrelevant, Jarrett now identifies a deadly force issue as warranting this Court's review. Petition, p. 13. It does not.

As noted, there is no conflict in the circuits on the issue whether the use of trained police dogs constitutes deadly force, and Jarrett cited no authority to the First Circuit or to this Court holding that they do constitute deadly force. [5] There is, therefore, no need for this Court to define what is meant by "deadly

---

[5] The petitioner cites to criminal cases in which a defendant has used a dog to attack or to threaten injury to suggest that the use of a dog is "deadly," but reliance upon those cases is inapposite. Petition, n. 3. Apart from the fact that Jarrett never raised this argument to the courts below and cannot now, the fact remains that those cases involve criminal conduct and specific criminal statutes — which clearly do not apply to and are in no way analogous to a police officer's use of a trained police dog to apprehend a fleeing suspect. Petitioner is clearly reaching.

force" in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985), as Jarrett argues. Petition, p. 13. Similarly, that there may exist a conflict in the circuits as to whether the Model Penal Code ("MPC") definition of deadly force applies to a Fourth Amendment analysis is not relevant to any review of this decision. In any event, it is noteworthy that the ultimate conclusion has remained the same in these circuits — the use of a properly trained police dog in the course of apprehending a suspect does not constitute deadly force. *Kuha v. City of Minnetonka*, 328 F.3d 427, 435 n.3 (8th Cir. 2003).

Rather, review of excessive force claims involving police dogs properly have been governed by the general standard established in *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871 (1989), where this Court made "explicit what was implicit in *Garner's* analysis," and held that "all claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard...." According to *Graham*, 490 U.S. at 396-297, the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, and its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

The First Circuit analyzed the claim under the *Graham* standard and concluded that no Fourth Amendment violation had occurred. The decision in no way tells law enforcement to "abandon its reasonable methodology" nor "threatens the well-accepted law enforcement approach" toward weapons, as petitioner suggests. Petition, p. 14.

## III. The First Circuit Court of Appeals Did Not "Overturn a Jury's Resolution of the *Graham* Factors."

The petitioner's suggestion that the First Circuit somehow disturbed the jury's resolution of the *Graham* factors is meritless. In fact, it is the petitioner who is ignoring the jury's resolution.

Contrary to Jarrett's assertions, the First Circuit expressly acknowledged that when a qualified immunity defense is pressed after jury verdict, deference should be accorded the jury's discernible resolution of disputed factual issues. Apx. A-11, citing *Iacobucci v. Boulter*, 193 F.3d 14, 23 (1st Cir. 1999). It specifically took "into account the 'jury's discernible resolution of disputed factual issues ....' " Pet. Apx. A-16. It noted that the jury had determined in Phase I that Officer McClelland used excessive force when he released Shadow. In Phase II, however, the jury found that he had acted in accordance with the policies and procedures of the Town when he released Shadow. Pet. Apx. A-11, 12. Nothing in the record suggested that the town's policies permitted an officer to command a dog to attack a suspect who had already surrendered. After careful review and consideration, the Court determined

it could "safely attribute the following factual findings to the jury: 1) Officer McClelland issued three verbal warnings to Jarrett before releasing Shadow and 2) at the time McClelland released Shadow, Jarrett had not surrendered to the police, but was resisting arrest by fleeing." Pet. Apx. A-13, 14.

It then applied and considered those findings in analyzing the *Graham* factors. Pet. Apx. A-17, 18. Notably, *Graham* also explicitly recognizes, and allows for, a measure of deference to officer judgment given the "tense, uncertain, and rapidly evolving circumstances that officers often confront." *Graham*, 490 U.S. at 396-397, 109 S.Ct. 865. Upon consideration and review of the jury's findings and the *Graham* factors, the Court properly concluded that Officer McClelland had not violated Jarrett's Fourth Amendment rights. Clearly, review is not necessary to address the "overturning" of a jury's resolution.

## IV. Review is Not Warranted To Determine the Role Department Policy Plays in Finding a Constitutional Violation.

The petitioner again mischaracterizes the First Circuit's holding in arguing for this Court's review. As discussed, the Court did not find there was no constitutional violation simply because Officer McClelland "followed a widely practiced police policy". Petition, p. 17. The petitioner again ignores the fact that the Court specifically and carefully considered whether the particular use of the bite-and-hold force at issue was excessive pursuant to the *Graham* Fourth Amendment analysis. It was based upon that review that the Court determined there was no

constitutional violation. The panel thus in no way "diluted the Fourth Amendment's 'objective reasonableness'." Petition, p. 17. Rather, it confirmed that conduct must be determined to be objectively reasonable under the Fourth Amendment.

As such, contrary to the petitioner's assertion, this case does not warrant this Court's review "to determine the role department policy plays in determining a constitutional violation." Petition, p. 16. In any event, the petitioner's cite to this Court's decision in *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692 (1999), is inapposite inasmuch as that decision stated that "a policy ... could not make reasonable a belief that was contrary to a decided body of case law." The bite-and-hold policy is not contrary to a decided body of law.

## CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

Leonard H. Kesten*
Deidre Brennan Regan
Brody, Hardoon, Perkins & Kesten, LLP
One Exeter Plaza
Boston, Massachusetts 02116
(617) 880-7100

**Counsel of Record*